Speaker NR 12/7

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

APPEAL NO. 81-2920

Wednesday, December 9, 1981

16-83-0012
#212
546135

ATARI, INC.,

A Delaware corporation, and

MIDWAY MFG. CO.,

an Illinois corporation,

Plaintiffs-Appellants,

v.

NORTH AMERICAN PHILIPS CONSUMER ELECTRONICS CORP.,

a Tennessee corporation, and

PARK TELEVISION, d/b/a/ PARK MAGNAVOX HOME ENTERTAINMENT CENTER,

an Illinois partnership,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Civil Action No. 81 C 6434

Hon. George N. Leighton
Judge Presiding

(1)

EMERGENCY MOTION OF APPELLANTS FOR EXPEDITED APPEAL AND BRIEFING SCHEDULE AND FOR AN INJUNCTION PENDING APPEAL

Appellants come before this Court on an emergency basis because the District Court failed to take action to halt self-evident copyright infringement and acknowledged deception in the sale of video games in the frenzied pre-Christmas market. Plaintiffs-Appellants own exclusive rights to PAC-MAN, the most popular and successful video game in history. Defendants-Appellees

recently began marketing on a test basis an infringing video game, called K.C. Munchkin, and retailers are at this moment promoting and merchandizing K.C. Munchkin as "just like PAC-MAN" and "Odyssey's [defendants'] PAC-MAN." Appellees will soon begin flooding the pre-Christmas market with infringing K.C. Munchkin games, totally sapping the demand for a home version of PAC-MAN and forever altering the status quo such that this Court would be unable to grant appellants full remedy or relief. Time is of the essence in this matter.

Pursuant to Rules 2 and 27, Fed.R.App.P., plaintiffs-appellants, Atari, Inc. ("Atari") and Midway Mfg. Co. ("Midway") hereby move this Court to hear this appeal on an expedited basis. Pursuant to Rule 8(a), Fed.R.App.P., and Circuit Rule 6, appellants further move this Court for immediate entry of an injunction pending appeal granting them emergency relief against the copyright infringement, deceptive practices, and unfair competition described in their Verified Complaint and Motion for a Preliminary Injunction (Exhibits A and B hereto). In support of this motion, appellants state:

1. Midway manufactures and distributes a coin-operated video game known as "PAC-MAN," sales of which have exceeded $150,000,000.*/ In the words of appellees' trial expert, PAC-MAN is "indisputably the most popular coin-operated game in the country." Midway owns the United States copyright registration covering the audiovisual content of the PAC-MAN video game as well

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*/ A copy of a PAC-MAN brochure (Plaintiffs' Exhibit ("Pl. Ex.") 4) is attached as Exhibit D hereto.

as the trademark PAC-MAN in the United States. Atari holds exclusive license rights in the home video and personal computer field under the PAC-MAN copyright and trademark. Atari has to date committed over $1.5 million for the licensing, development, advertising and promotion of its authorized, licensed PAC-MAN home video game, and, by January 1982, Atari's investment in its PAC-MAN game will exceed $5.5 million. Atari has currently booked orders for over 1,000,000 PAC-MAN home video games, representing sales of over $24,000,000. Atari's PAC-MAN is the largest selling home video game cartridge in history.

2. In the November 16, 1981 issue of Newsweek magazine, defendant-appellee, North American Philips Consumer Electronics Corp. ("North American") introduced a home video game known as "K.C. Munchkin."*/ Since this introduction, North American has extensively advertised and promoted K.C. Munchkin as a part of its Christmas 1981 marketing effort. North American initially shipped a few K.C. Munchkin games to selected retail dealers. However, shipments of large quantities of the K.C. Munchkin games into retail outlets throughout the country were to commence in December 1981.

3. When the K.C. Munchkin game came to Atari's attention in mid-November, Atari immediately recognized that K.C. Munchkin was an adaptation into the home video game format of the copyrighted PAC-MAN coin-operated video game. Atari's worst

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*/ A copy of the advertisement for K.C. Munchkin (Pl. Ex. 6) is attached hereto as Exhibit C hereto.

fears were realized when North American's dealers began advertising and passing the K.C. Munchkin game off at retail as "just like PAC-MAN," "Odyssey's [defendant's] PAC-MAN," and as a "PAC-MAN type game."

4. As a result, on November 18, 1981 (two days after the introduction of K.C. Munchkin), appellants filed their Verified Complaint and immediately sought a Temporary Restraining Order and a Preliminary Injunction to enjoin further advertising, distribution and sale of the K.C. Munchkin video game because it infringed appellants' registered copyright in the PAC-MAN audiovisual work and because of the unfair competition and deceptive trade practices which were occurring. The District Court, at defendants-appellees' request, postponed an evidentiary hearing on plaintiffs' motion for a preliminary injunction until November 25, 1981. The District Court received evidence and heard arguments of counsel on November 25 and 30. The District Court released its Memorandum of the Court's Findings of Fact and Conclusions of Law denying plaintiffs' preliminary injunction at 4:30 P.M. on December 4, 1981. The District Court also denied plaintiffs' oral motion for an injunction pending appeal.*/

5. Appellants immediately appealed the District Court's denial of their motion for a preliminary injunction.**/

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*/ The Minute Order denying plaintiffs-appellants' motion for preliminary injunction and staying the time for interloctury appeal pending filing of the District Court's Findings and Conclusions is attached as Exhibit E; the Court's Memorandum ("Mem.") of its Findings of Fact and Conclusions of Law is attached as Exhibit F; and the Minute Order denying plaintiffs' motion for an injunction pending appeal is attached as Exhibit G.

**/ A copy of the Notice of Appeal is attached as Exhibit H.

The District Court's denial of preliminary injunctive relief was a clear abuse of discretion in that the District Court erred as a matter of law by: (1) refusing to consider clear evidence of North American's intent to develop a PAC-MAN game; (2) ignoring the overwhelming showing that North American's dealers recognized the high degree of similarity between K.C. Munchkin and PAC-MAN by advertising and selling K.C. Munchkin as "the same as PAC-MAN" and "just like PAC-MAN"*/; and (3) holding that the passing off of K.C. Munchkin as "just like PAC-MAN," "a PAC-MAN game," and "Odyssey's [defendants'] PAC-MAN" by North American's dealers is not a deceptive trade practice or unfair competition because the labels used on the K.C. Munchkin product are not similar to the labels used on PAC-MAN.

6. In declining to afford the proper scope of protection to the copyright covering one of the most popular audiovisual works in its field, the District Court applied an incorrect legal standard. The magnitude of the District Court's error on the infringement issue is made clear from the side-by-side pictures of the PAC-MAN and K.C. Munchkin video games submitted herewith as Group Exhibit J. These photographs (which are part of the video tape in evidence (Pl. Ex. 8) illustrating the two games) show the substantial similarity of the overall visual appearance of PAC-MAN and K.C. Munchkin, including the common characters which appear and similar events which take place in the audiovisual sequence of both games. Based on the self-evident similarity of

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*/ Copies of two retail ads by North American dealers (Pl. Exs. 9 and 18) describing K.C. Munchkin as a "PAC-MAN game" and "PAC-MAN type game" are attached as Exhibit I.

the games alone, appellants have a very substantial likelihood of prevailing on the merits of their appeal.

7. Even after this suit was filed, North American's dealers have continued to refer to the "K.C. Munchkin" game as "just like PAC-MAN," "Odyssey's PAC-MAN," "the same as PAC-MAN."*/ Of all of the North American dealers visited by plaintiffs' investigator, Thomas Gallo, only one failed to equate K.C. Munchkin to PAC-MAN in the course of attempting to sell the K.C. Munchkin video game. (Hearing transcript ("Tr.") 108). The District Court erred as a matter of law in ignoring this evidence, which proves not only appellants' unfair competition claim but also the infringing character of the K.C. Munchkin game.

8. The substantial similarity between K.C. Munchkin and PAC-MAN is not surprising. North American's development project for K.C. Munchkin was initiated after North American's executives learned of the popularity and success of PAC-MAN, and with admitted knowledge of and access to the PAC-MAN game. (Mem. 2). Moreover, while its game was under development, North American contacted Midway to request a license under the PAC-MAN copyright and trademark, only to learn that Atari had instead obtained the home video rights to "PAC-MAN." (Mem. 11). Nevertheless, North American went ahead with a "careful, conscious decision" to

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*/ In addition to live testimony, plaintiffs' introduced documentary evidence before the District Court on this issue. Copies of advertisements for North American's K.C. Munchkin, showing its identification with PAC-MAN, (Pl. Exs. 10, 11, 19, 20) are attached hereto as Group Exhibit K. See also Exhibit I hereto.

introduce K.C. Munchkin after making only minor cosmetic and color changes. (Mem. 13; Stipulation of Facts ("Stip."), ¶7).*/ Finally, the spontaneous recognition by the trade of the high degree of similarity between the games and improper use of references to PAC-MAN in promoting sales of K.C. Munchkin came as no surpirse to North American. North American anticipated this reaction and the current deceptive trade practices in internal memoranda.**/ The District Court erred as a matter of law in ignoring this plain evidence of North American's intent to copy the copyrighted PAC-MAN audiovisual work in violation of plaintiffs' proprietary rights in PAC-MAN.

9. The District Court also committed a clear error of law in holding that the evidence of dealers passing off K.C. Munchkin as PAC-MAN was not evidence of unfair competition or deceptive trade practices because the labels for the two games are not similar. (Mem. 20). Although similarity of product labels can establish the basis for an unfair competition claim, label similarity is not a prerequisite for proving unfair competition as the District Court erroneously held. Here, the spontaneous recognition by North American's dealers that K.C. Munchkin copies PAC-MAN, and the resultant passing off of K.C. Munchkin as PAC-MAN, not only proves appellants' copyright infringement claim but also represents a classic case of deceptive trade

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*/ A copy of the Stipulation of Facts is attached as Exhibit L hereto.

**/ Copies of these memoranda (Def. Exs. 21 and 22) are attached as Exhibit M hereto.

practices and unfair competition. An immediate injunction should issue on this independent ground, to halt the public deception and damage to appellants caused by the distribution of K.C. Munchkin.

10. The requested injunction pending appeal is urgently necessary to preserve this Court's jurisdiction to provide effective relief on appeal. Unless enjoined, North American will: (1) continue to sell copies of its infringing K.C. Munchkin game during the peak Christmas season; (2) exhaust the pent-up market demand for the incredibly popular PAC-MAN home video game; (3) successfully preempt Atari's right to sell the authorized, genuine licensed PAC-MAN home video game; and (4) continue to cause public deception and irreparable damage to appellants by passing off K.C. Munchkin as PAC-MAN. North American's own witnesses conceded the seasonal nature of the market for these video games and also that timing is of the essence in marketing popular video games. Thus, if an injunction pending appeal is not entered, Atari and Midway will be denied any opportunity for effective relief when the Court of Appeals ultimately corrects the District Court's errors of law in applying settled of principles of copyright and unfair competition law.

11. There is no way that plaintiffs can ever be compensated for the continuing injury to their exclusive rights in the PAC-MAN copyrighted work if North American is permitted to continue advertising and marketing its K.C. Munchkin game with the attendant retail confusion and misrepresentation the evidence

reveals. The retail evidence proves that the ordinary observer views K.C. Munchkin as the home version of PAC-MAN. That, without more, demonstrates both the ultimate merit of appellants' appeal and the urgency of providing injunctive relief pending determination of the issues posed by this appeal.

12. The District Court properly found that appellants have suffered irreparable injury, also correctly noting that the law requires that such injury be presumed where, as here, ownership of a valid copyright is conceded. (Mem. 18). The District Court went on to note the "great monetary value" of appellants' rights (Mem. 4), including Midway's enormous success and investment in PAC-MAN (Mem. 4) and Atari's "large investment" in and payment of a "substantial sum" as royalties for "future distribution [of PAC-MAN] for home video and personal computer use." (Mem. 5). In contrast, the District Court made no finding as to any hardship to defendants-appellees were a preliminary injunction entered. Accordingly, it is plain that the balance of hardship tips decidedly in appellants' favor. Accordingly, all of the elements for the issuance of an injunction pending appeal have been established under the rule of Adams v. Walker, 488 F.2d 1064, 1065 (7th Cir. 1973).

The manifest failure of the District Court to follow controlling copyright and unfair competition precedent, the extraordinary injury being suffered by appellants, the minimal impact an injunction would have on North American, and the public interest in avoiding retail and consumer confusion and misrepresentation, all mandate that this appeal be heard on an expedited

basis and that an injunction promptly be entered pending appeal.

Appellants suggest a briefing schedule calling for the filing of their brief on appeal by the close of business of the second day following this Court's order establishing the briefing schedule, for appellees' brief to be filed within a similarly shortened two-day time period, and for appellants' reply to be filed one day thereafter, followed by early oral argument.

The grounds for this Motion are set forth more fully in the accompanying memorandum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel W. Vittum, Jr., certify that on December 7, 1981, I caused a copy of the foregoing Emergency Motion of Appellants for Expedited Appeal and Briefing Schedule and for an Injunction Pending Appeal, to be hand delivered to Theodore W. Anderson, Gregory B. Beggs, and James T. Williams, NEUMAN, WILLIAMS, ANDERSON & OLSON, 77 West Washington Street, Room 2000, Chicago, Illinois 60602.

Daniel W. Vittum, Jr.